



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 12, 1996

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
DeWitt C. Greer State Highway Bldg.  
125 E. 11th Street  
Austin, Texas 78701-2483

OR96-1123

Dear Ms. Soldano:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40181.

The Texas Department of Transportation (the "department") received a request for information concerning Asphalt Design Inc. ("Asphalt"). You assert that the information at issue is confidential under section 552.110 of the Government Code. As provided by section 552.305 of the Open Records Act, this office provided Asphalt the opportunity to submit reasons as to why the information at issue should be withheld. In correspondence to this office, Asphalt contends that the information submitted to the department is excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As the department has not raised section 552.104 nor indicated that it is applicable in this situation, the information at issue is not excepted from disclosure pursuant to section 552.104.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute and information protected by common-law or constitutional privacy. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. Thus, the federal tax return information must be withheld from disclosure.

Section 552.101 also allows information to be withheld under common-law privacy if it is highly intimate or embarrassing *and* if it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W. 2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 328 (1982) at 2-3. There is no protected common-law privacy interest in financial information about a business. Open Records Decision No. 192 (1978) at 4 (right of privacy protects feelings of human beings, not property, business or other monetary interests); *see* Open Records Decision No. 373 (1983) at 3 (privacy interest in financial information relating to individual). However, we have marked one document, containing financial information about certain individuals, that is protected from disclosure by common-law privacy.

Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a *prima facie* case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the

business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; *see also* Open Records Decision No. 522 (1989).

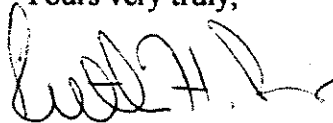
However, this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Nor has the governmental body or Asphalt shown that the submitted information comes within the commercial or financial aspect of section 552.110. A "mere conclusory assertion of a possibility of commercial harm" is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." In this situation, section 552.110 has not been shown to be applicable to the information at issue.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 40181

Enclosures: Submitted documents

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